IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

WILLIAM H. KILLOREN, Trustee in Bankruptcy of Hamilton-Brown Shoe Company, a Corporation, Bankrupt, Petitioner, vs. UNITED STATES OF AMERICA, Respondent.	No.....

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

THE OPINIONS OF THE COURTS BELOW.

The District Court rendered no opinion; its order appears on Page 14 of the Record.

The opinion of the Circuit Court of Appeals, reversing this order, will be reported in 119 F. (2d) 364 (see Adv. Sheets June 9, 1941). It was filed on April 30, 1941, and appears at Page 21 in the Record.

JURISDICTION.

Reference is made to the jurisdictional statement contained in the petition in this Court.

STATEMENT OF THE CASE.

Reference is made to the Summary Statement of the Matter Involved, contained in the petition.

SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals, Eighth Circuit, erred in finding and holding that priority may not be allowed to expenses incurred in the administration of the estate by the Trustee in Bankruptcy, over expenses, and specifically taxes, incurred during the attempted reorganization before the appointment of the Bankruptcy Trustee.

2. The Circuit Court of Appeals, Eighth Circuit, erred in holding that Section 64 (a) of the Bankruptcy Act of 1898, as amended, controls absolutely the priorities to be given in distribution of the proceeds of a liquidation in bankruptcy, and requires without exception that all costs of administration be on a parity, in a case that originated as a Chapter X proceeding, in which was subsequently entered an order that bankruptcy be proceeded with.

3. The Circuit Court of Appeals, Eighth Circuit, erred in failing to give effect to Section 238 of the Bankruptcy Act of 1898, as amended, which requires only that, after the order directing that bankruptcy be proceeded with, the proceeding shall be conducted in so far as possible in the same manner and with like effect as if an involuntary petition for adjudication had been filed at the time when the petition under Chapter X was filed and the decree of adjudication entered at the time when the petition filed under Chapter X was approved.

SUMMARY OF ARGUMENT.

Since the law imposes duties upon the Courts of Bankruptcy which they must perform, such Courts, as Courts of Equity, have jurisdiction to make such orders as are necessary to enable them to perform their prescribed functions.

If the provisions of Section 64 (a) of the Bankruptcy Act are applied without flexibility in the liquidation of cases originating under Chapter X, the functions of Bankruptcy Courts will be paralyzed. Therefore, the Bankruptcy Court, both under its equity powers and under a saving clause, the "so far as possible" provision contained in Section 238 of the Act, has power to order first paid the expenses necessarily incurred in the liquidation of the estate.

ARGUMENT.

Since the law imposes duties upon the Courts of Bankruptcy which they must perform, such Courts, as Courts of Equity, have jurisdiction to make such orders as are necessary to enable them to perform their prescribed functions. If the provisions of Section 64 (a) of the Bankruptcy Act are applied without flexibility in the liquidation of cases originating under Chapter X, the functions of Bankruptcy Courts will be paralyzed. Therefore, the Bankruptcy Court, both under its equity powers and under a saving clause, the "so far as possible" provision contained in Section 238 of the Act, has power to order first paid the expenses necessarily incurred in the liquidation of the estate.

The Bankruptcy Court acquired jurisdiction to liquidate the estate of the bankrupt by virtue of the provisions of Article XII of Chapter X of the Bankruptcy Act of 1898, as amended. Section 238 thereof provides, in effect, that in such liquidation Section 64 (a) of the Act controls "so far as possible." In the present case the Circuit Court of Appeals held that the provisions of Section 64 (a) are absolute and inflexible and that strict adherence thereto is required.

It will be impracticable or impossible for Bankruptcy Courts to liquidate estates where assets are insufficient to pay all claims incurred during both periods (i. e., during

the period of operation under Chapter X and during the period of liquidation), if the law requires such absolute and inflexible equality.

Upon receipt of an order that bankruptcy be proceeded with, the Referee is required by Section 58 of the Bankruptcy Act to give notice of the first meeting of the creditors. General Order in Bankruptcy No. 24 requires that the Referee maintain a list of the claims filed; Order No. 26 requires that he maintain a record of his accounts; Section 58 of the Act requires further notices to the creditors. The trustee in bankruptcy in liquidating the estate must pay newspapers for notices and a surety company for his bond, the auctioneer for the expenses and commissions of the sale. The appraisers must be paid their fees. The law demands that the Referee and the trustee, in liquidating an estate, do certain things. The doing of those things involves necessarily the incurring of obligations to pay the incidental expenses, including the expense of the services of the Referee, the trustee, and counsel for the trustee. If the Referee be not empowered to authorize the trustee to pay for the doing of those things which the law requires to be done, estates in bankruptcy originating as Chapter X proceedings cannot be properly administered in those cases where the assets are insufficient to pay all costs of administration. For instance, the trustee must furnish creditors with information. To do so he must purchase stamps, for trustees' letters are not franked. Is the Referee authorized to reimburse the trustee only on a pro rata basis? Commissions must be paid to real estate men for selling the trustee's real estate. If the trustee shall not be permitted to pay such commission prior to the costs incurred during operations under Chapter X, but shall be required to pay them only on a pro rata basis, obviously the trustee will be unable to effect a sale of his real estate. And so on, ad infinitum.

Section 2 (a) of the Bankruptcy Act imposes upon

Courts of Bankruptcy certain obligations. Among other things, such Courts must cause the estates of bankrupts to be collected, liquidated and distributed. Controversies with reference thereto (the determination of which may involve expense) must be determined. Such Courts are, therefore, empowered to "make such orders, issue such process, and enter such judgments * * * as may be necessary for the enforcement of the provisions of this Act * * *." Under Section 2 (b) of the Act it is provided that such Courts are not, by special enumeration of powers, deprived of any power such Courts "would possess were certain specific powers not herein enumerated." A broad base for the many judicial declarations of the equity jurisdiction of Bankruptcy Courts is to be found in the first sentence of Section 2 (a) of the Act, by the terms of which the Courts are specifically invested with such jurisdiction "in equity as will enable them to exercise original jurisdiction in proceedings under this Act."

Unless the Bankruptcy Court be permitted to incur the expense of preservation and liquidation of the estate, and to pay that expense as a prior claim, it cannot function.

Congress must have intended that the language "so far as possible" of Section 238 have some significance. It was certainly designed to meet practical necessities. The situation confronting the Referee in Bankruptcy in the case here is confronting the Courts of Bankruptcy all over the country. Unfortunate operations under Chapter X have resulted in many situations such as this one, and the Courts must be given the power to liquidate the estates. The essential function of liquidation of bankrupt estates requires that the power be accorded the Bankruptcy Court to authorize its Trustees to pay their obligations in full.

It appears from the opinion that the Circuit Court overlooked the settled rule of statutory construction that when

a very literal interpretation of a statute will produce an unreasonable or absurd result, the reason of the law shall prevail over its letter. *Church of the Holy Trinity v. United States,* 143 U. S. 457, 36 L. Ed. 228, 12 Sup. Ct. 511. The Courts will properly assume that Congress did not intend to paralyze Bankruptcy Courts by withdrawing from them the power to administer, preserve, and liquidate bankrupt estates. It must follow that an interpretation which will preserve the processes of the Bankruptcy Court must be given, rather than a literal interpretation which will destroy the essential functions of the Courts. *U. S. F. & G. Co. v. Bray,* 225 U. S. 205, l. c. 217, 56 L. Ed. 1055, 32 Sup. Ct. 620; *Williams v. U. S. F. & G. Co.,* 236 U. S. 549, 59 L. Ed. 713, 35 Sup. Ct. 289; *Kothe v. R. C. Taylor Trust,* 280 U. S. 224, 74 L. Ed. 382, 50 Sup. Ct. 142; *Kuehner v. Irving Trust Co.,* 299 U. S. 445, 81 L. Ed. 340, 57 Sup. Ct. 298.

This rule of statutory construction is well illustrated by the holding of this Court in a case dealing with Section 265 of the Judicial Code. That statute expressly prohibits Federal Courts from enjoining proceedings in State Courts "except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." Notwithstanding the express language of that statute, the Federal Courts in actions in rem have repeatedly protected their jurisdiction by exercising the power to enjoin State Court proceedings even though the Federal Court has not taken possession of the res. Notwithstanding the plain and express terms of the statute, Courts have presumed that Congress did not intend to deprive Federal Courts of the power to preserve and protect their own jurisdiction. *Kline v. Burke Construction Co.,* 260 U. S. 226, 67 L. Ed. 226, 43 Sup. Ct. 79.

This Court, in the case of *Pepper v. Litton,* 308 U. S. 295, 84 L. Ed. 281, 60 Sup. Ct. 238, brushed aside the con-

tention that the equity powers of the Court of Bankruptcy are abridged or restrained by the inflexible language of the Bankruptcy Act, in determining the rights of claimants, and held that, if equity compelled, the claim of one creditor might be subordinated to claims of other creditors. True enough, there was fraudulent conduct involved in the Pepper case, but relief from fraudulent conduct is not the only basis for the exercise of the equity power of the Courts.*

In the case at bar, the net effect of the order of the Referee, affirmed by the District Court, would be that the claims of the beneficiaries of the efforts of those who participated in the proceedings in bankruptcy proper should be subordinated to the claims of those who so participated because the latter have a superior equity. There is no fraud claimed in this case, but the superiority of the equity of the creditors of the bankruptcy proceeding as opposed to the creditors of the reorganization proceeding, is equally clear and well established. *Warren v. Palmer*, 310 U. S. 132, 84 L. Ed. 1118, 60 S. Ct. 865; *New York Dock Company v. Steamship Poznan*, 274 U. S. 117, 71 L. Ed. 955, 47 Sup. Ct. 482; *Trustees v. Greenough*, 105 U. S. 527, 26 L. Ed. 1157. The power of a liquidating court to pay in full the expenses incurred by it in the accomplishment of that liquidation springs ipso facto from the judicial possession of the property and is necessary in order that the Court may adequately care for the property. This doctrine, announced in *Warren v. Palmer*, was not alluded to by the Circuit Court of Appeals in its opinion.

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*The Eighth Circuit Court of Appeals, in the case of *Bird and Sons Sales Corporation v. Tobin*, 78 F. (2d) 371, 101 A. L. R. 654, in the face of the express mandate of Section 65 (a) of the Bankruptcy Act requiring that "dividends of an equal per centum shall be declared and paid on all allowed claims, except such as have priority or are secured," exercised the equity power of the Court to compel a creditor with an allowed claim to abide by a subordination agreement made prior to bankruptcy.

CONCLUSION.

We respectfully submit that the opinion of the Circuit Court of Appeals, for the reasons heretofore given, is unsound and establishes profound uncertainty in the field of bankruptcy administration. Our argument that the enforcement of the rule laid down by the Circuit Court of Appeals in this case will result in paralysis of administration is no mere rhetorical gesture. The Referee and trustee in such cases as this are faced with a situation where either they cannot pay to have those things done which the law requires to be done or, if they be paid for, the trustee subjects himself to a liability or surcharge upon his official bond for doing what the Circuit Court of Appeals has, in this case, held he cannot do. We submit that the question is one of vital and compelling importance. It is an outgrowth of the enactment of Chapter X of the Bankruptcy Act. Cases such as this are pending throughout the country. The question here involved has never been presented to the Supreme Court of the United States so far as we are advised. It is one of tremendous gravity, not merely to the officers of the Bankruptcy Courts, but to the general public. Its determination is extremely important to parties dealing with or rendering service to trustees in bankruptcy. We further submit that the decision is in conflict with the principles announced in the decisions of this Court heretofore referred to, and that therefore a writ of certiorari should issue as prayed for herein.

Respectfully submitted,

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HARRY S. GLEICK,
Counsel for Petitioner.